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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1199~~ 89

ALTON J. LEMON, ET AL., *Appellants,*

v.

DAVID H. KURTZMAN, ET AL., *Appellees.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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OCTOBER TERM, 1969

No. 1189

ALTON J. LEMON, ET AL., *Appellants*,

v.

DAVID H. KURTZMAN, ET AL., *Appellees*.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Appellees, Archbishop Wood High School for Girls, Germantown Lutheran Academy, Akiba Hebrew Academy, Beth Jacobs Schools of Philadelphia, Philadelphia Montgomery Christian Academy, St. Anthony's School, and Holy Ghost School, move to dismiss this appeal, or, in the alternative, to affirm the judg-

ment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

I. STATEMENT OF THE CASE

A. The Statute Involved

As revealed in the legislative findings, one out of every five elementary and secondary school pupils in Pennsylvania attends a nonpublic school. There are eleven hundred eighty-one nonpublic schools in the state which are now under contract with the Commonwealth pursuant to Act 109 of 1968 (Pennsylvania Nonpublic Elementary and Secondary Education Act), the enactment here challenged. Located in 55 of Pennsylvania's 67 counties, they have a total pupil population of 535,215 children.

Both in the title to the Act and in the statement of legislative findings and declaration of policy, the General Assembly set forth its purposes in enacting the legislation. In these it stressed (a) the educational need of individual children (b) the contribution of private schools in the face of the general educational crisis. The General Assembly specifically declared that the Act is legislation

> "to promote the welfare of the people of the Commonwealth of Pennsylvania" and "to promote the secular education of children . . . attending nonpublic schools", (Sec. 5601)

and that

> "the governmental duty to support the achieving of public welfare purposes in education may be in part fulfilled through government's support of those purely secular educational objectives

> achieved through nonpublic education", (Sec. 5602(3))

further that

> "hazard to the education of children [occasioned by the overall education crisis] may be substantially reduced and all education in the Commonwealth improved through the purchase herein provided of secular educational services from Pennsylvania nonpublic schools". (Sec. 5602(6)).

The Act provides that the Commonwealth may enter into contracts with nonpublic schools for reimbursement to them of the actual cost of "secular educational service" consisting of instruction solely in the four subjects of Mathematics, Modern Foreign Languages, Physical Science and Physical Education. A "nonpublic school" is defined to mean a school, other than a public school, wherein a resident of Pennsylvania may legally fulfill the requirements of the Pennsylvania compulsory attendance law. "Secular educational service" is defined to mean "the providing of instruction in a secular subject", while "secular subject" is defined as follows:

> ". . . any course which is presented by the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect".[1]

"Actual cost" comprises three items of such service: textbooks, instructional materials, and teachers' salaries. Following the established pattern of govern-

[1] This critically important provision is omitted from discussion in the Jurisdictional Statement and even from quotation or reference in the dissenting opinion below.

mental reimbursement in purchase of other welfare services,[2] payment is made under terms specified by the Commonwealth, pursuant to official contract forms.

The Act imposes explicit controls in three essential aspects: (1) secularity controls (limitation to the four markedly non-value related subjects, along with the definition of "secular subject", which, as noted, excludes any religious teaching or exercise of the "sectarian function")[3] (2) quality controls, *viz.*, the requirements (Section 4604) of (a) state approval of the textbooks in question (b) state-approved standardized testing (c) teacher certification (3) fiscal controls. Section 7(a) provides:

> "Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of *separate funds and accounts* pertaining to the cost of secular educational service, as to *establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursement.* Such accounts shall be subject to audit by the Auditor General." (Emphasis supplied.)

The funding of the Act is exclusively from sources which are not, and have never been, utilized for support of the public schools. Section 5606 expressly prohibits using money raised for the support of the public schools in the Commonwealth to pay for services under

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[2] See, *e.g.*, Schade v. Allegheny County Inst. Dist., 386 Pa. 507 (1956).

[3] The phrase is taken from Board of Education v. Allen, 392 U.S. 236, 248 (1968).

the Act, or even for expenses in connection with administration of the Act.[4]

The extensive Rules and Regulations[5] issued by the Department of Public Instruction in December, 1968, to implement the Act, further elaborate the aforementioned secularity, quality and fiscal controls.

On July 1, 1968, this Act became effective. The first services under the Act were rendered commencing in September of that year. In the Fall of 1970 this program will enter upon its third year of operation.

B. The Proceedings Below

On June 3, 1969, Plaintiffs (Appellants here) brought this action, naming as defendants the Commonwealth Secretary of Education,[6] the Commonwealth Treasurer and seven nonpublic schools. The action was brought as a class action, the named schools being sued as representative of (1) all sectarian educational institutions in the Commonwealth of Pennsylvania (2) all educational institutions in Pennsylvania which (allegedly) discriminate against persons by reasons of race or religion, "the number of such sectarian and

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[4] Since the Act provides for reimbursement, no question can arise as to any "unrestricted" use by the nonpublic school of the state payment (*Cf.*, Jurisdictional Statement, 10), nor any "designating the portions of its curriculum for which it wants assistance". (*Cf.*, dissenting opinion, Lemon v. Kurtzman, — F. Supp. —, — (E.D. Pa. 1969).

[5] RULES AND REGULATIONS FOR IMPLEMENTING THE PENNSYLVANIA NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT. These were before the court below, at its own request as well as by stipulation of counsel. For the convenience of the Court, counsel have supplied official copies of these to the Clerk of the Court.

[6] The title, prior to July 23, 1969, was "Superintendent of Public Instruction".

other educational institutions being too numerous to be conveniently joined as defendants in this suit".

The Complaint alleged in three counts that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution, and prayed for a judgment to that effect. It also sought to enjoin payments under the Act and requested the convening of a three-judge court.

On July 25, 1969, defendant schools (Appellees here) filed the following motions material to a disposition of this appeal: (1) Motion Under Rule 23(c) (2) Motion to Dismiss Complaint For Failure of Plaintiffs to have Standing to Sue, and (3) Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted. The court granted leave to the Pennsylvania Association of Independent Schools to intervene as a party defendant for purposes of presenting argument on the Defendants' Motion to Dismiss.

In their motion under Rule 23(c) defendant schools sought a hearing and a determination that the seven named defendant schools were not representative of the 1,181 nonpublic schools participating under the Act. Ten days later, on August 5, 1969, Plaintiffs filed their Answer to Defendants' Motion Under Rule 23(c), stating:

> "Plaintiff(s) agrees that the action will not be maintained as a class action under Rule 23(c) of the Federal Rules of Civil Procedure."

Accordingly, on August 20, 1969, the court entered the following order:

> "4. In the light of plaintiffs' 'Answer to Defendants' Motion under Rule 23(c)', IT IS FUR-

THER ORDERED (a) that the within action shall not be maintained as a class action . . ."

Notwithstanding the foregoing, Plaintiffs subsequently insisted that their action was an attack upon the validity of the Act in relation to *all* religiously affiliated schools in the Commonwealth and was not confined to the seven defendant schools. See Plaintiffs' Memorandum on the Necessity of a Three-Judge Court, filed October 1, 1969, page 2; Transcript of Oral Argument, October 13, 1969, page 87. Thus, in legal effect, Plaintiffs delimited their claim to one of unconstitutionality of the statute as to all religiously affiliated schools and not with regard to any particular practice in any identified schools.

Following submission by the parties of extensive briefs and subsequent oral argument, the three-judge court ruled on the motions to dismiss for want of standing and for failure to state a claim. Other motions before the court were not reached.

As to the motion on standing: it was ruled that:

(a) None of the organizational Plaintiffs had standing to sue under any of the asserted causes of action. This was without dissent.

(b) None of the individual Plaintiffs had standing to sue under the Equal Protection Clause, since none alleged any discriminatory statutory classification, policy, or practice of which he or she was the object. This was without dissent.

(c) Only one of the individual Plaintiffs (Lemon) had standing under the Establishment Clause. This was without dissent.

(d) All individual Plaintiffs had standing under the Free Exercise Clause. One judge dissented.

As to the motion to dismiss for failure to state a claim, the issues were thus narrowed to the Establishment and Free Exercise questions. Respecting the Establishment question the court stated the issue to be: "whether the purpose or primary effect of the Pennsylvania Education Act on its face or in the necessary effect of its administration is to advance or inhibit religion". — F. Supp. — (E.D. Pa. 1969).

Applying the test laid down in *Board of Education* v. *Allen,* 391 U.S. 236, 242, 243 (1968), the court stated that the purpose of the Pennsylvania Act "can be found clearly on its face". The court referred expressly to those provisions of the Act in which the General Assembly articulated the secular legislative purposes of the Act as well as the specific legislative findings upon which those purposes were founded. The court granted Defendants' motion to dismiss for failure to state a claim, under the Free Exercise and Establishment Clauses. As to the Free Exercise claim, the court stated that, since the Act does not advance or support religion, it does not constitute compulsory taxation for the support of religion. Further the court stated that there was "no allegation in the plaintiffs' complaint as to what their particular religious beliefs are nor how the Education Act coerces them in the practice of their religion". *Id.* at ———.

As to the Establishment claim, the court likewise found it to be without merit. The court based its conclusions squarely upon the decision of the Supreme Court in *Board of Education* v. *Allen:*

> "We recognize that 'private education . . . is playing a significant and valuable role in raising na-

tional levels of knowledge, competence, and experience', 392 U.S. at 247, and that the public's reliance on private education is being provided in these schools. We further recognize, as did the Supreme Court in *Allen,* that the 'State's interest in education may be sufficiently served by reliance *on the secular teachings which accompany religious training'* in nonpublic schools. 392 U.S. at 245. Furthermore, we consider that 'religious schools pursue two goals, religious instruction and secular education', 392 U.S. at 245, and we believe that the State may aid the secular function rather than the sectarian function of private educational institutions in the public interest of education within proper confines and without participating in a forbidden involvement in religion proscribed by the First Amendment. The Education Act on its face authorizes the Commonwealth to contract only for services connected with the *strictly secular* function of educating Pennsylvania's school children in the secular subjects of mathematics, physical sciences, modern foreign language, and physical education. That the Commonwealth must not be involved in the religious functions of sectarian educational institutions is clearly established by the nature and kind of strictly secular subjects selected in the statute itself and the controls and restrictions placed upon the statute's operation by the regulations promulgated thereunder. Thus limited and restricted we cannot hold that the statute advances religion either in purpose or primary effect. Moreover, the statute applies to *all* nonpublic schools both sectarian and nonsectarian. As it may apply to sectarian institutions, we concur with the Supreme Court's statement in *Allen,* supra, that *'we cannot agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined* that secular textbooks furnished to students by the public are in fact instrumental in

the teaching of religion'. (Emphasis added.) 392 U.S. at 248." *Id.* at ———.

* * *

". . . the statute is limited not only to secular subjects but to a limited number of *specific* secular subjects peculiarly unconnected with and unrelated to the teaching of religious doctrines. The statute is further limited and confined to the purchase of services at cost. Unlike *Schempp* and *Engel* the statute here maintains a position of complete *religious* neutrality. In *Zorach* v. *Clauson*, 343 U.S. 306, the Court approved the State's encouragement of 'religious instruction' and its cooperation 'with religious authorities'. Here the Education Act does not go so far as to encourage the teaching of religious matter. We recognize that the separation of Church and State embodied in the nonestablishment principle is not a self-defining concept. The increasing national concern for education in our society, coupled with the public awareness that private schools are performing a significant public service in educating great numbers of school-age children, necessarily makes the State interested in private education." *Id.* at ———.

With regard to the fact that reimbursement payments under the Act go formally to schools, and not to the individual children, the court deemed that circumstance to be insubstantial:

"Nor do we find persuasive the argument that the child must be the direct beneficiary of government funds which support secular education. Such an approach would place form over substance in that a constitutional result would depend upon minute distinctions and technicalities. The child and society generally certainly benefit from the improvement of the secular education the child receives regardless of whether there is a direct

payment or loan to him or to his parents or to his school or teachers. In our view the constitutional result should not and cannot wholly depend upon the identity of the payee. The use to which the funds are put must be the primary concern." *Id.* at ———.

The dissenting judge, stating that no Plaintiffs had standing under either the Equal Protection or Free Exercise Clauses, confined his opinion to the Establishment Clause and considered the Act to be in violation thereof. He acknowledged that "the Establishment Clause . . . does not preclude the state from providing any assistance, no matter how indirect, to religious institutions". *Id.* at ———. He nevertheless condemned the assistance to education provided for by the Act, on the basis that the Act involves "direct public financing". Secondly, he stated that the subjective motivation of the founders of Pennsylvania's parochial schools rendered the primary purpose of the Act "religious". Thirdly, he held unnecessary any inquiry as to whether any course given in a parochial school is secular in content and in manner of teaching, stating that the place of the teaching program and the subjective motivation of the parochial school administrators are the crucial constitutional considerations.[7]

Finally, relying upon the dissent of Mr. Justice Douglas in *Allen,* the dissent considered the Act to require the state to intrude offensively upon religious matters.

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[7] "The crucial consideration is that the total teaching program is offered in *a separate religious environment* and *for the better achievement of appropriate religious objectives.*" *Id.* at —. (Emphasis supplied.)

II. QUESTIONS PRESENTED

This appeal raises the following questions:

1. Do the organizational Appellants have a requisite personal stake or interest in the outcome of this controversy to confer standing upon them to bring this action?

2. Do the Appellants Reardon and Worrell, who are not affected taxpayers or parents of affected school children, have standing to bring this action?

3. Does the Appellant Lemon, who is not within the class of persons affected by the Act nor the object of any discriminatory practice thereunder, have standing to challenge the Act under the Equal Protection Clause?

4. Does the Act violate the Establishment Clause?

5. Does the Act violate the Free Exercise Clause?

III. ARGUMENT

A. Preliminary Questions

The Jurisdictional Statement recites eight questions (Pages 4-6). Subsequently, however, at Page 15, Appellants raise procedural questions which are not embraced by the section entitled "Questions Presented". Under the established practice of this Court, these additional questions are not properly raised and thus are not grounds for entertaining review. See, STERN & GRESSMAN, SUPREME COURT PRACTICE, 298, 352 (4th ed.). These collaterally raised questions involve: (1) the propriety of dismissing the Complaint upon motion to dismiss, (2) the claimed necessity for discovery and trial, and (3) whether the court below was justified in construing the statute without attempting to

"take judicial notice of the official Committee proceedings, transcripts, reports and journals of the House and Senate of Pennsylvania, and the regulations and application forms promulgated by the Superintendent of Public Instruction[8] . . ." (Jurisdictional Statement, 15).

(1) The Propriety of Dismissal of Plaintiffs' Complaint Under Rule 12(b)(6). Appellants urge as a "substantial question", the propriety of dismissing the Complaint under Rule 12(b)(6). The time-honored rule that only well-pleaded facts are admitted on motion to dismiss is challenged by Appellants as a radical departure from accepted standards. A long procession of cases commencing in the early common law has insulated the rule from attack, and belies Appellants' assertion. In judging the sufficiency of the Complaint, as a matter of law, the District Court followed the classic formula:

> "A motion to dismiss is the usual and proper method of testing the legal sufficiency of the Complaint. For the purposes of the motion, the well-pleaded material allegations in the Complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." 2A MOORE'S FEDERAL PRACTICE ¶ 12.08 (1968).

See, *e.g., Ward* v. *Hudnell,* 366 F. 2d 247 (5th Cir. 1966); *Homan Mfg.* v. *Russo,* 233 F.2d 547 (7th Cir. 1956); and *Le Clair* v. *Swift,* 76 F. Supp. 729 (E.D. Wis. 1948) (adding that general conclusions of fact do not rebut the presumption of constitutionality of state action).

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[8] The regulations (including the application forms) were, in fact, before the court at its own request, as well as by stipulation of counsel, and they are part of the record herein.

Appellants charge the court below with arbitrarily rejecting their characterization of the statute as one which, by purpose and effect, advances and aids religion. Yet, by so pleading, Appellants sought to foreclose examination of the statute's purpose and effect. Appellants would parade this allegation under the heading of "facts", but that the statute aids religion is clearly a legal conclusion. This averment amounts to no more than pleading that the statute is unconstitutional. Surely, Appellants are in error in implying that once a complainant characterizes a statute as "unconstitutional" or, for that matter, a document as a "contract", courts are barred by such conclusions from examining the legal consequences of the statute or document. Thus, Appellants' conclusory allegations were properly ignored by the District Court which made an extensive examination of the purpose and effect of the statute and concluded that it was constitutional.

Having so concluded, the Court decided that, under *Allen,* there was simply no law to support Appellants' claims of unconstitutionality. Hence the District Court followed one of the best recognized uses of a motion to dismiss. See *De Loach* v. *Crowley's Inc.,* 128 F. 2d 378 (5th Cir. 1942). Since it is possible to make a determination of constitutionality, under a Rule 12(b)(6) motion,[9] Appellants' urgings for discovery and offers to prove various facts (Jurisdictional Statement, Page 16) can serve no useful function; the purpose and effect of the statute are clear.

(2) The Claimed Necessity for Discovery and Trial. Appellants voice a supposed grievance that alleged

[9] See, *e.g.*, Kirk v. Boehm, 216 F. Supp. 952 (E.D. Pa. 1963) affd. 376 U.S. 512 (1964) (this Court granting motion to affirm); Baker v. Carr, 369 U.S. 186 (1962).

fact issues raise the need for a trial. (Jurisdictional Statement, Page 15). The full answer to this contention requires an explanation of the confusion created by ambiguities in the Complaint, and by the Appellants' ambivalent usage of the term "as applied". Fortunately, this confusion was clarified in the court below prior to the disposition of the motion to dismiss.

The Complaint initially attacked the Act "as applied" without specifying whether the claims of misapplication related to: (a) the manner of the execution of the Act by state officials, or (b) alleged disqualifying practices of certain schools, or (c) all church-related schools, as a class, because they also teach religion.

Official misapplication is not suggested by the Complaint.[10] The second basis—the possibility of disqualifying practices— was readily eliminated from the case by the Appellants themselves. Following Appellees' Rule 23(c) Motion challenging the class-action averment, the Appellants agreed that the action should not proceed as a class action: which meant that the practices of the seven named schools were not deemed representative of practices in all the 1,181 schools under contract. The court below entered a Pre-Trial Order to that effect. (See Pages 6-7 above).

After eliminating the class aspect of the action, the Appellants contended that their Complaint attacked the statute as applied to all church-related schools as a group. Thus, in response to the court's request for a

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[10] Appellants later disavowed this basis of attack, stating: "Obviously we are not concerned here with the improper exercise of authority in a particular case where the action purports to rest on an otherwise constitutional foundation." Memorandum of Plaintiffs on the Necessity of a Three Judge Court, filed October 1, 1969, pp. 2-4.

memorandum from counsel on the need or propriety of a three-judge court in the event the statute were deemed facially constitutional, Appellants' counsel set forth their position:

> ". . . let us say this: *the Act is unconstitutional in every application throughout the sixty-seven counties of Pennsylvania,* excepting only the possibility that some nonpublic school can be produced which (a) is non-church related, and [other conditions not here pertinent]
>
> * * * * * *
>
> "The fact that particular grants are enumerated in the Complaint as instances of unconstitutionality does not narrow the claim that the statute in its entirety is invalid. *Certainly it would be a strained misreading of the Complaint to in any way construe it as limited to a particular grant to a particular school or class of schools or to anything less than an attack on the entire statutory scheme. . . . .* In this case *the foundation itself, the underlying statute, by which taxpayer funds are sought to be given to sectarian institutions is claimed to be invalid* and the 'doom' of that foundation on a statewide basis is the obvious objective of the present case." (Emphasis supplied) Memorandum of Plaintiffs on the Necessity of a Three Judge Court, filed October 1, 1969, pp. 2-4.

And at oral argument on the Motion to Dismiss, Appellants' counsel declared:

> "*I am not saying,* and I think I have made this clear, that *this Act is only unconstitutional as to these defendant schools.* I am talking about it being unconstitutional in its entire purpose, thrust and effect." Transcript of Oral Argument, October 13, 1969, p. 87 (Emphasis supplied).

Paragraphs 18, 19, and 20 of the Complaint do not charge that the Act is unconstitutional as applied to

the seven Appellee schools, but "as applied" generally. (For example, Paragraph 18 refers not to the Appellee schools, but to "sectarian schools".) Furthermore, the prayer for relief in the Complaint is addressed not to the Appellee schools, but requests total nullification of the statute.

In view of the foregoing, the court below properly interpreted the words, "as applied", to mean that Appellants challenged the statute both on its face and *universally* "as applied" to all church-related schools. It is church-relationship and the teaching of religious as well as secular subjects, not any specific practices of any given schools, which Appellants allege to be the "doom" of the statute.

Taking the Appellants' attack at face value—as expressed by the Complaint, by the withdrawal of the class action, by the oral and written argument of Appellants' counsel, and by the insistence upon the necessity of a three-judge court—the court below properly disposed of the action without requiring a trial that was obviously unnecessary. For the suit challenged the statute "in its necessary effect"—a position with which the dissenting judge did not disagree.

Having mounted their theory of total constitutional nullification, *solely upon allegations of church-relatedness and religious instruction* (allegations that were admitted by the Motion to Dismiss), there can be no need for trial or discovery relating to actual practices in any of the seven Appellee schools.

The Complaint (Paragraph 13) alleges that the Act applies to sectarian schools which teach religion; and all counsel and judges agreed that the overwhelming majority of schools covered by the Act fall into that

category. With these foundation facts admitted, the Appellants' theory of unconstitutionality "as applied" becomes solely a question of law. No additional facts derived from discovery or at trial can resolve this legal issue.

Appellees acknowledge that the disposition by the court below does not preclude any qualified plaintiff from raising a constitutional challenge to the Act "as applied" with reference to specific schools, based upon their respective particular activities peculiar to them.

(3) The Determination of the Legislative Intent. The court below found the purpose of the Act clearly expressed within the four corners of the Act: a plan to promote secular education in nonpublic schools. See Pages 2-5 (*supra*). Accordingly it refused to reexamine the legislative history. Appellants have not claimed the language of the Act to be in any respect *ambiguous* (thus necessitating resort to the legislative background for purposes of clarification). Rather, Appellants ask this Court to hold that the General Assembly was guilty of *deception*, or a sham, in falsely expressing its actual purpose in enacting the legislation. This Court has already precluded excursions into legislators' motivations:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: 'The decisions of this court from the beginning lend no support whatever to the assumption that this judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused this power to be exerted.' McCray v. United States, 195 U.S. 27, 56 (1904)." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968).

B. This Appeal Presents No Substantial Federal Question

(1) The Asserted Standing of the Organizational Appellants Does Not Present a Substantial Federal Question. The court below ruled (without dissent) that none of the six organizational Appellants had standing to sue. The Complaint did not allege that the organizational Appellants sued as taxpayers, or as representing taxpayers or members, or that the Act in any way dealt with the status, purpose, assets, or activities of these organizations. The Complaint was content with the general allegation that the organizations shared "common objectives".

In light of the well settled principles expounded by this Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968), it is clear that the organizational Appellants have failed to assert any "personal stake in the outcome of the controversy", or organizational "injury in fact". *Assn. of Data Processing Service Organizations, Inc.* v. *Camp*, — U.S. — (1970); 38 U.S. Law Week 4193 (March 3, 1970). They appear to rely solely upon the discredited "private attorney general", or "public action", theory."

(2) The Asserted Standing of the Appellants Reardon, Worrell and Lemon Does Not Present a Substantial Federal Question. The court below (without dissent) denied standing to sue to all three individual Appellants under the Equal Protection Clause, and to Appellants, Reardon and Worrell, under the Establishment Clause, on principles firmly established by this Court. *Flast* v. *Cohen, supra; Camp, supra.*

(a) Establishment and Equal Protection. With respect to the Establishment Clause, the court pointed

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[11] See, Doremus v. Board of Education, 342 U.S. 429, 431 (1953); Davis *Standing: Taxpayers and Others*, 35 U. of Chi. L. Rev. 601 (1968).

out that the Complaint makes no allegation that Reardon or Worrell paid any of the admissions taxes which constitute the sole source of funding under the Act (Section 5606). Hence they could not qualify as "affected taxpayers" having any "personal stake" in the outcome of the controversy. As this Court has recently reiterated: "The first question is whether plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Camp, supra.*

With respect to the Equal Protection Clause, the court found no allegation that Reardon or Worrell have any relationship to any school child; there was only the allegation that Lemon is a Negro parent of a *public* school child. As the court below stated: "... there is no allegation . . . that Lemon or his child is personally affected by any alleged discrimination . . . in these [nonpublic] schools" nor any allegations "which assert that Lemon's child . . . was denied admission [to such school] because of race or religion." *Lemon* v. *Kurtzman,* — F. Supp. —, — (1969). Absent any allegation that Lemon or his child were the object of alleged discriminatory practices, Lemon was properly held to lack standing to assert an Equal Protection challenge to the Act.[12]

(b) Free Exercise. For reasons not clear to Appellees, the Appellants attack the ruling favorable to them below, namely, that the individual Appellants had standing to assert Free Exercise claims. (See "Questions Presented", No. 3). While this issue is not central to the disposition of this appeal, Appellees must deny that the Complaint establishes any such standing.

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[12] While the Jurisdictional Statement attempts to raise substantive Equal Protection questions, such issues are not before this Court, since they were not reached by the District Court.

It alleges no facts to show what, if any, religious beliefs are held by the individual Appellants or how the Act might be deemed to coerce them in the practice of their religion. Only Lemon paid a tax covered by the Act. This case is, therefore, controlled by the ruling in *McGowan* v. *Maryland,* 366 U.S. 420 (1961) wherein this Court denied Free Exercise standing to the plaintiffs, with the following declaration:

> "But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedom due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are." *Id.* at 429.

Therefore, since no Appellant has Free Exercise standing, this Court should not consider the substantive Free Exercise question raised by this appeal.

(3) The Appeal Presents No Substantial Federal Question Under the Establishment Clause. The Establishment question raised by this appeal is rendered insubstantial by the clear and governing compass of the recent decision in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). All judges below and all the parties to the case have asserted the common conclusion that the *Allen* test of constitutionality [13] is here controlling.

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[13] "Based on Everson, Zorach, McGowan, and other cases, Abington School District v. Schempp, 374 U.S. 203 (1963), fashioned a test ascribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits: 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education.' 374 U.S. at 222."

(Jurisdictional Statement, Page 10). The District Court's finding that the Act has a secular legislative purpose and a primary effect that does not advance religion cannot be seriously disputed so as to raise a substantial federal question. The legislative, administrative and contract controls above explained (Pages 3-5) squarely meet the requisites and rationale of the *Allen* decision, namely, that church-related schools which also teach religion, are not, by that fact, constitutionally disqualified to receive public assistance limited to the achievement of their "secular educational function". To suggest, as do Appellants, that secularly rendered instruction in the Act's covered subjects, Mathematics, Modern Foreign Languages, Physical Science and Physical Education, do not advance society's "task of secular education" is to blink reality.

Appellants misconceive the concept of "effect" in determining the constitutionality of statutes. To find a statute unconstitutional, a court must find—not some impermissible effect in application— but that such effect is an "inevitable" effect dictated by the "necessary scope and operation" of the statutory text. *United States* v. *O'Brien,* 391 U.S. 367, 386 (1968). As the Act in question is drawn, such a finding is not possible under the controlling *Allen* decision.

The "primary effect" test of *Allen* contemplates that the chief or principal statutory effect is to advance religion. The Act provides partial reimbursement of the costs actually incurred by nonpublic schools for secular education in the covered subjects. There is no profit to the schools. Under the Act's clear provisions, not one dollar may be received by a nonpublic school except upon proof that that dollar replaces a like amount already expended by such school as the actual

cost of a secular educational service rendered to children.

The cases upholding statutory programs as having no primary effect of advancing religion are particularly instructive. *Board of Education* v. *Allen, supra; McGowan* v. *Maryland, supra; Everson* v. *Board of Education,* 330 U.S. 1 (1947). *Allen* and *Everson* respectively approved of public expenditures to supply textbooks and bus transportation to parochial school children as not advancing religion. The Court in *Everson* declared:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children *to get a secular education* serves no public purpose." 330 U.S. 1 at 7. (Emphasis supplied).

The public purpose achieved through expenditures aiding the education of parochial school children was recognized as long ago as 1930:

> "The schools . . . are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries . . . [The legislation's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded." *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370, 375 (1930).

These cases, which recognize that government may achieve secular, public-interest goals through religiously affiliated institutions, stand in sharp contrast to those cases in which government has sought to advance religious goals through public institutions:

Epperson v. *Arkansas,* 393 U.S. 97 (1968) (anti-evolution teaching); *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963) (Bible-reading and prayer); *Engel* v. *Vitale,* 370 U.S. 421 (1962) (state-sponsored prayers); *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948) (sectarian instructional programs).

(4) *The Appeal Presents No Substantial Federal Question Under the Free Exercise Clause.* Even if any of the Appellants has standing under the Free Exercise Clause, it is clear nevertheless that no substantial question is presented thereunder. To state a cause of action under the Free Exercise Clause, a party must allege that the law coerces him, as an individual, in the practice of his religion. Appellants failed to allege in their Complaint what their particular religious beliefs were, or that the Act coerced them, as individuals, in the practice of their religion. This Court has said:

> " . . . 'it is necessary in a Free Exercise case for one to show the coercive effect of the enactment as it operates against him *in the practice of his religion',* Abington School Dist. v. Schempp . . . and appellants have not contended that the New York law in any way *coerces them as individuals in the practice of their religion."* (Emphasis supplied). *Board of Education* v. *Allen, supra,* 248, 249.

The allegation that the Act "constitutes compulsory taxation for the support of religion" must fail if, as under *Allen,* the primary effect of the Act does not advance religion. For, assuming, *arguendo,* that the taxation which funds this Act is compulsory, it is not for the support of religion.

CONCLUSION

Under the settled principles established by this Court in cases involving standing to sue, the Establishment Clause, and the Free Exercise Clause, it is respectfully submitted that this appeal presents no substantial federal question. The Opinion and the Judgment of the court below should be affirmed, or in the alternative, the appeal should be dismissed.

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Respectfully submitted,

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